Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1994

ANANIAS GUMBUS, JR., et al.,
Petitioners,

v.

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
AFL CIO/CLC; LOCAL UNION 242 UNITED
FOOD AND COMMERCIAL WORKERS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the statute of limitations on a claim against a Union is tolled during the pendency of the Union's active representation of the Plaintiffs, in the District Court, for breach of the collective bargaining agreement which underlying claim gives rise to the breach of the duty of fair representation claim before this Court?

2. Whether the due diligence requirement is applicable when related litigation is pending?

3. Should due diligence be required, under equitable tolling, when the Defendant has undertaken to actively conceal, by affirmative acts, Plaintiff's cause of action?

LIST OF PARTIES

The petitioners are:

1. Ananias Gumbus, Jr.,
2. Frank Adams, Jr.,
3. Joseph W. Alsandor,
4. Clayton Andrews,
5. Earnest Lee Armour,
6. Ellis Baker,
7. Charles W. Banks,
8. David Bernard Banks,
9. Harry Lee Banks,
10. Johnnie Lee Bass,
11. Dock E. Bates,
12. Raymond Beckley,
13. Andrew Boller, Jr.,
14. Felix Booker,
15. Robert Bowden, Jr.,
16. Lonnie Bridgeforth, Jr.,
17. Andrew L. Broome,

18. Charles L. Broughton,

19. Linsey J. Brown,

20. Charles E. Brown,

21. Robert L. Brown,

22. Willie F. Brown,

23. Lester Busby,

24. Alvin Lee Butts,

25. Therman Byrd,

26. Earnest T. Calhoun,

27. Shirley Cassini,

28. William L. Carpenter,

29. Levy Cathey,

30. Clinton Clairborne,

31. Andrew B. Cleaves,

32. Calvin Cobb,

33. Leroy Conley,

34. David D. Cornelius,

35. Freddie Crawford,

36. Lombus Crenshaw,

37. Richard C. Crump,

38. Robert L. Cruther,

39. Ledora Curry, Next of kin to John H. Curry, Deceased.,

40. Leon Curry,

41. Charles W. Davis,

42. Roy E. Davidson,

43. James F. Dean,

44. John T. Delk, Sr.,

45. Walter H. Dortch,

46. Larry J. Douglas,

47. Alonzo Travis Dye,

48. Willie Fred Earl,

49. Herman Edwards,

50. Thyree Edwards, Jr.,

51. Dlae B. Evans,

52. Clifton Feathers,

53. Elmer G. Flowers,

54. Claude L. Franklin,

55. Leland Fryer,

56. Sally Lee Gaines, Next of kin to

Richard Gaines, Deceased.,

57. Curtis Garner,

58. Harvey L. Garret,

59. John D. Gentry,

60. Ben O. Gilbert,

61. Ezekiel Glispie,

62. Tyler R. Glover,

63. Willie E. Golden,

64. Jessie Gray, Jr.,

65. David L. Gregory,

66. Carl A. Gurkin,

67. Hubert Hall,

68. O. D. Hall,

69. Robert E. Hall,

70. Will B. Hall,

71. Dan Halley,

72. Anthony Halmon,

73. Damon Hamilton,

74. Billy Hampton,

75. Harry E. Hansel, III,

76. General L. Hardy,

77. Robert M. Harkness,

78. Mary Edna Harkness,

79. James E. Harrel,

80. Bobby G. Harris,

81. Lee E. Harris,

82. Melvin C. Harris,

83. Wylie L. Harris,

84. Bobby Gee Hayes,

85. Richard Hayes,

86. W. C. Hayslett,

87. Bob Hendree,

88. Joe Henderson,

89. Floyd L. Holliday,

90. John H. Holliday,

91. Leroy Holmes,

92. Maurice Horton,

93. Lester Houston,

94. Sharon Howard,

95. Obie R. Howell, Jr.,

96. Essie hubbard,

97. Rita Williamson, Next of Kin to Walter H. Humphrey, Deceased.,

98. Charles L. Hurt,

99. Lue James Irvin,

100. Fredrick D. Isom,

101. Johnny Jack,

102. Wardell Jackson,

103. W. C. Jamerson,

104. Betty Jarret, Next of Kin to Charlies M. Jarret, Deceased.,

105. Cecil Johnson,

106. Eugene Johnson,

107. Michael R. Johnson,

108. Tommie Lee Johnson, Jr.,

109. Edmond E. Jones,

110. George W. Jones,

111. Joe W. jones,

112. R. C. Jones,

113. Lee V. Joyner,

114. Roy Lee Joyner,

115. Harvey Kearney, Jr.,

116. Doris Jean Kerr,

117. Elbert J. Kuykindall,

118. James L. Kuykindall,

119. Joseph L. Kinkle,

120. John E. Leake,

121. Jessie James Lee, Jr.,

122. Ralph D. Leek,

123. Ronald eugene Levy,

124. Donald Lewis,

125. Paul Masen,

126. Walter Mass,

127. Willie Mathews,

128. James E. McClung,

129. William G. McCuin,

130. Eddie B. McKinney,

131. Lester L. McKinney,

132. Roy A. Medlin,

133. Joe H. Merriweather,

134. Edker Lee Mitchell,

135. Gary A Mitchell,

136. James M. Mitchell,

137. John H. Mitchell,

138. James C. Moody,

139. Booke T. Moore,

140. Jerry Murphy,

141. Prentis E. Naylor,

142. Bennie Neal,

143. James Nelson,

144. Dalton Nickleberry,

145. Lillian Nickleberry, Next of Kin to Chester Nickleberry, Deceased.,

146. Mark Nickelberry,

147. James E. O'Bannon,

148. otis Patton,

149. Nathaniel Perry,

150. Paul Pickens,

151. Jerry C. Pinner,

152. Elnora Pointer,

153. James E. Pointer,

154. Andrew Pollard,

155. Lonzo Pollard, III,

156. Charles Powell,

157. Frank A. Quinn,

158. James C. Quinn,

159. Terry L. Ramsey,

160. Verge Rhyan,

161. David W. Richardson,

162. Robert Riley,

163. Milton Douglas Jones, Sr.,
Next of Kin to
Earnest James Robertson, Deceased.

164. Jeffery Lynn Robinson,

165. Elvis calvin Rodgers,

166. Walter H. Rodgers,

167. Johnnie V. Rodriquez,

168. Willie G. Russell,

169. Charles Edward Salter,

170. Willie Salter, Jr.,

171. Oscar Sales,

172. David Shannon,

173. Albert Shipp,

174. Robert Shreve,

175. Warutta Snow, Next of Kin to A. C. Snow, Deceased.,

176. Mark Smith, Jr.,

177. Bobby G. Stricklin,

178. Jamie D. Stricklin,

179. Brad Strikland,

180. Matthew Strong, Jr.,

181. Sammie L. Swanagan, Jr.,

182. John T. Taylor,

183. Robert Taylor,

184. James W. Thomas,

185. Clarence E. Thompson,

186. James A. Thompson,

187. James Unknown Thompson,

188. Jerry Mack Thorton,

189. Paul L. Tittle,

190. Willie L. Tuggle,

191. R. T. Tyler,

192. Clarence Ulmer,

193. Samuel Upchurch,

194. Naomi R. Naomi R. (Wilson) Villes,

195. Morris B. Walker, Jr.,

196. Marry L. Ward,

197. William E. Ward,

198. Joe White,

199. Louis E. White,

200. Richard Whitmore,

201. Harrold H. Williams,

202. Jerry L. Williams,

203. Reuben E. Williams,

204. Robert E. Williams,

205. Herman C. Wilson,

206. Leo Wilson,

207. Lonnie F. Wilson,

208. Wayne Bernard Wilson,

209. Willie Joe Wilson,

210. Charles Windless, Jr.,

211. Neugene Woodward,

212. Paul Woodard,

213. Calvin Woods, Jr.,

214. Bernard Wright,

215. Sidney A. Yates,

216. James M. Yates, Sr.,

217. Arthur Lee Butts,

218. Allen Brown,

219. Billy W. Harris, and

220. James E. Thompson.

The respondents are:

1. United Food and Commercial Workers International Union, AFL-CIO/CLU, and

2. Local Union 242 United Food and Commercial Workers.

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OPINIONS BELOW

The District Court for the Western District of Tennessee filed its unpublished opinion - ORDER GRANTING MOTION TO DISMISS AND DENYING RULE 11 SANCTIONS - on November 30, 1992, is reprinted in Appendix A.

The Sixth Circuit Court of Appeals filed its unpublished opinion on January 6, 1995, and is reprinted in Appendix B.

The Sixth Circuit Court of Appeals filed its unpublished opinion - ORDER DENYING PETITION TO REHEAR- on Febuaury 17, 1995, is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The Order Denying Motion To Rehear by the Sixth Circuit Court of Appeals was entered Febuaury 17, 1995 and this Petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

In July of 1982, John Morrell & Co. shut down its Memphis plant resulting in nearly 600 workers losing their jobs. In February of 1983, the Unions representing the Morrell workers learned that Morrell had plans to re-open the Memphis plant. In September of 1983, the Memphi s Packing Company is opened and the former Morrell employees were not hired back pursuant to the collective bargaining agreement. In January of 1984, 138 of the 600 laid off Memphis workers filed a private cause of action against both the company and the Unions, Cummings (hereinafter Cummings' (1)). However, the remaining 450 plus workers chose to stay with Union representation, who promised to protect the workers'

interest and get the workers "more money" if the workers did not join Cummings (1).

In 1987, the Unions filed claims and cross-claims (Cummings v. Morrell) on the Petitioners' behalf, in both the pending District Court case and before the NLRB, against Morrell for their breach of the collective bargaining agreement in 1983-84. In Cummings, the Unions asserted that the state statute of limitations for contracts was applicable. (A legal position the Unions claim in "good faith" to be correct until ruled upon in 1991 and 92 by both the NLRB and the District Court to be legally invalid). However, on August 27, 1991, the NLRB dismissed the Unions claims, filed on behalf of the Petitioners', holding that the state contract statute of limitations was not

applicable and the Unions' suit was therefore, untimely. Within 6 months of the NLRB decision, which was the ***first*** public decision placing the Petitioners' on notice that the Unions may have failed to adequately represent their interests by filing a timely suit, the Appellants sought independent representation and filed suit (Gumbus et. al.) against the Unions for breaching their duty of fair representation.[1]

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[1] In the interim, in 1989, the Cummings' (1) plaintiffs settled with Morrell and shortly thereafter, in December of 1989, the Unions settled with the Cummings' (1) Plaintiffs. However, the 1989 settlement of Cummings (1) was a non-disclosed, no admission of guilt settlement agreement including a liquidated damages clause for breach of the settlement's confidentiality by any of the Cummings' (1) Plaintiffs. **(It is important to note,** however, that the Unions continued to pursue the claims on behalf of the Petitioners in this case (Gumbus et al.) against Morrel.)

In the District Court, Petitioners' argued that their statute of limitations should be tolled under an equitable tolling theory. In support of their contention, the Petitioners submitted affidavits showing that they were informed by the Unions and their representatives, from 1984 to 1991, the following:

1. Statement in Union meetings: "don't join the other claim, we will get more money for you;"

2. Personal conversations: "don't waste your money" by getting another attorney, the Union is handling your claim and "we will protect your interests;"

3. Response to letters and personal inquiries: "you will get your

money;" and

4. Statements to Memphis Packing Employees: "We got you covered."

See (Affidavits, Appendix D1-D10) Furthermore, as evident in the pleadings and affidavits, the Appellants were in constant contact with the NLRB and Sheryl Sternberg monitoring the status of their NLRB complaints filed by the Unions on their behalf.

However, on November 30, 1992, the District Court dismissed Petitioners' Gumbus et al. action as untimely. The 6th Circuit upheld the District Court's dismissal finding that the Petitioners should have known, after 1989, that their interest were not adequately being represented by the Unions. The 6th Circuit reasoned that the 1989 decision

in Aquinaga and the 1989 settlement of Cummings (1) (collateral cases involving completely different set of claimants) should have effectively aroused the Petitioners' suspicions of the Unions' breach of their duty of fair representation. Furthermore, the Court asserted that because of that arousal of suspicion, the Appellants' actions in relying upon Union assertions that in 1988 their claims were being pursued failed to meet the requirement of due diligence under an equitable tolling theory.

On February 17, 1995 the Sixth Circuit denied Petitioners' motion to rehear.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit ruled that the Petitioners' statute of limitations for breach of the duty of fair representation was not tolled during the pendency of the Unions' underlying claim, Cummings v. Morrell in the District Court, for breach of the collective bargaining agreement against the employer (John Morrell & Co.). This holding is dangerous precedent for Unions can now avoid liability for breach of their duty of fair representation by merely opting out of private resolution (permitting tolling) and filing suit in the District Court (prohibiting tolling). Although this Court has held that the statute of limitations is not tolled during the pendency of a collateral NLRB action,

this Court has not addressed whether tolling is permitted during the pendency of an underlying claim of related litigation in the District Court. However, in Honda v. Clark, 386 U.S. 484 (1967), this Court has held that statutes of limitations may be tolled during the pendency of related litigation.

In the case now before this Court, the Sixth Circuit held that Petitioners' statute of limitations began to accrue in 1988.[2] However, the breach of the duty of fair representation did not accrue until Petitioners' damages became irreparable and the Petitioners' damages did not become irreparable until both the

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[2] In 1987, the Unions had asserted claims, before the NLRB and the District Court, on Petitioners' behalf against Morrell for breach of the collective bargaining agreement. Furthermore, both claims were unresolved as of 1988.

NLRB's and the District Court's dismissal of the Unions' claims. In Acri v. International Assoc. Of Machinists, 781 F.2d 1393, 1396 (9th Cir. 1986), the Court held that "a cause of action does not accrue at the time plaintiff becomes aware of the wrong if, at that time, the plaintiff's damages are not certain to occur or too speculative to be proven." In 1988, the Petitioners' damages were not certain to occur for had the Unions been successful in their assertion of the Petitioners' cross-claims in Cummings v. Morrell (related litigation), the instant case would have been *moot*.

In Arnold v. Air Midwest, 1994 WL 247442, *8 (D. Kan), the Court held that a duty of fair representation cause of action awaits the exhaustion of grievance

process only if the "union represents an employee, throughout [the] grievance procedure" and the outcome of that process might cure or moot the duty of fair representation claim. Similarly, the filing an of action in the District Court has the same implications as that of internal grievance procedures in tolling the statute of limitations. Though the filing of NLRB actions do not toll the statute of limitations for § 301 actions, the NLRB action is not a parallel avenue or an underlying suit. NLRB actions are optional and, therefore, distinguishable from the instant case.

In the case now before this Court, the Union was contractually bound to represent the interest of the Petitioners'. By tolling the statute of

limitations for the DFR action while the Union has the underlying unfair labor practice action filed on the Petitioners' behalf in the District Court, the Court will be providing the Union an opportunity to fulfill their contractual obligations by representing the aggrieved Union members' interests. This situation is analogous to the policies of tolling the statute of limitations articulated in Dunleavy v. Local 1617, United Steel Workers, 814 F.2d 1087 (6th Cir. 1987). In Dunleavy, as in the case now before this Court, the 6th Circuit stated that:

> The Union's position would seem to require one placed in Dunleavy's situation to file a lawsuit which would become superfluous in the event of favorable Convention action simply as a matter of protection. In addition to other practical objections to such filings, we feel

> constrained to point out that we would be loath to require further cluttering up the docket of the overburdened federal judicial system for such a contingent purpose.

Id. At 1091.

However, the Sixth Circuit's ruling, in the case now before this Court, would have the Petitioners' file their suit in 1988 (against the Unions) while the Unions were pursuing the Cummings v. Morrell cross-claims, on Petitioners' behalf, in both the District Court and before the NLRB. Such a contingent filing would be the premature cluttering up of the federal docket of which Dunleavy warned. Furthermore, if Petitioners' had filed the Gumbus et al. action in 1988, their damages for the Unions' breach of duty of fair representation would have been

contingent, in 1988, pending resolution of the Unions cross-claims. Therefore, according to the 6th Circuit's reasoning in Dunleavy, a 1988 filing, of Gumbus et al. would have been termed premature and contingent clutter of the Federal Court's docket. However, according to the Sixth Circuit's holding in the instant case, the Petitioners' should have filed their action in 1988 even though their damages were not certain to occur and were contingent upon resolution of a pending underlying case.

Permitting tolling of the statute of limitations during the pendency of the Unions' underlying cross-claims on Petitioners' behalf is consistent with the general purposes of the statute of limitations. In Burnett v. New York

Central R.R., 380 U.S. 424 (1968), the Supreme Court explained that statute of limitations "promote justice by preventing surprise through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." The Unions have been involved in litigation over these matters as either Defendants or Plaintiffs (as in Cummings v. Morrell) since 1984. Furthermore, the Unions have been involved in litigation of these claims up to the 1993 Appeal of Aquinaga, including its ultimate denial of Certiorari in 1994, and up to the 1994 dismissal of the Cummings v. Morrel suit encompassing the Appellants' cross-claims. Therefore, the Union can hardly claim that it lacked

notice as to the nature of Petitioners' claim or that the relevant evidence is no longer extant.

The policy behind the six month statute of limitations for § 301 claims is the expeditious resolution of labor disputes. However, the 6th Circuit in Robinson balanced this objective with the policy of promoting private resolution of disputes while ensuring a judicial forum to resolve disputes. If the Unions' underlying cross-claims do not operate to toll the Petitioners' statute of limitations for their DFR claim, the policy articulated in Robinson will be undermined as exemplified by the following hypothetical:

Union realizes that it has made a fatal mistake in the representation of

its workers against the employer for breach of a collective bargaining agreement. The Union realizes that their error or omission will be disclosed to its workers if the matter is handled through internal grievance procedures and/or appeals. Furthermore, the Union knows that once the workers it represents discovers the errors, the workers can file a timely suit for breach of the duty of fair representation because internal procedures toll the statute of limitations.

Therefore, knowing that these internal procedures would toll the statute of limitations, the Union files suit in the Federal Court with claims on the workers' behalf hoping that by the time their errors are brought to the

attention of the Court and its workers,' the six month statute of limitations will have passed. The Union is correct. The errors are not brought out until 7 months after the filing of the Federal lawsuit. If the statute of limitations is not tolled during the pendency of the Union's underlying suit on their workers behalf, the workers have now lost their ability to file a timely breach of the duty of fair representation lawsuit merely because the Unions opted for resolution in the District Court (a factor beyond the trusting workers' control).

Therefore, the Union clearly has an incentive to file suit in the Court knowing that when the truth is discovered, the workers will have to successfully argue equitable estoppel or

remain complete remediless. Given the Sixth Circuit's reticence in applying this doctrine, it is clearly to the Union's advantage to forego internal proceedings which toll the statute of limitations and file in the Federal Courts.

Such manipulation should not be countenanced by this Court and, therefore, this Court is respectfully requested to hold that the Petitioners' actions were tolled during the pendency of the Unions' underlying claims. This avoids the needless filing of contingent cases of which Dunleavy warns while affording Unions the opportunity to represent their workers without a contingent claim hanging over their heads. To hold otherwise would:

1. Place the workers in the ambivalent situation of suing those who claim to be representing them in good faith,

2. Give Unions incentive to opt out of internal procedures which toll the workers' statute of limitations and is contrary to the policy of promoting private resolution of labor disputes,

3. Give Unions incentive to file suit in the District Court to prevent workers' claims from tolling,

4. Give Unions incentive to file suit in District Court thereby forcing workers to meet the burdens of due diligence and equitable estoppel if and when the suit fails. (Note, these issues would not arise if internal procedures were followed and a decision contrary to the Union, evidencing Unions' breach of DFR,

was rendered internally).

DUE DILIGENCE

This Court, it is submitted should resolve the substantial conflict among the Circuit Courts as to whether the due diligence standard applies where a defendant has engaged in affirmative acts of concealment beyond the original fraud itself. Those Circuits[3] applying the rule of due diligence have rationalized that the rule "will work no injustice in cases of active concealment . . . [because a]ctive concealment by the defendant will be considered in determining the reasonableness of the behavior of the plaintiff under the

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[3] 6th Circuit, 10th Circuit, and 5th Circuit.

circumstances." Cambell v. Upjohn Co., 676 F.2d 1122 (1982). In contrast, the Second, Seventh, and D.C. Circuits have held that where the defendant has engaged in active concealments or frauds, the statute of limitations is tolled until actually discovery by the plaintiff.[4]

The Sixth Circuit's steps to eliminate the potential harshness of requiring due diligence in cases of active concealment (by taking into consideration the acts of concealment when determining whether due diligence has been satisfied) have failed in the case now before this Court. It is illogical to reward parties committing

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[4] Tomera v. Galt, 511 F.2d 504 (7th Cir. 1975); Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986); Robertson v. Seidman & Seidman, 609 F.2d 583, 593 (2nd Cir. 1975).

ongoing and calculated fraudulent acts by placing, on those injured by the fraudulent acts, the burden of showing due diligence. Furthermore, the instant case exemplifies the potential injustice arising under a rule requiring due diligence in cases of active concealments. Therefore, the failure of this Court to resolve this conflict will continue to produce extensive forum shopping, chaos, and uncertainty which is precisely what a Statute of Limitations is designed to correct in an area of law that cries out for uniformity and fairness.

In the case now before this Court, the Sixth Circuit cited Cambell v. Upjohn Co., 676 F.2d 1122 (6th Cir. 1982), for the proposition that relying on the

assurances from a union or company official is not sufficient to meet the burden of diligence. In Cambell, the Plaintiff merely relied on the oral assurances of company officials and shareholders that a payment to him was forthcoming. Furthermore, in Cambell, the Sixth Circuit questioned whether mere oral assurances can amount to an active concealment.

However, in 1988 (the date that the Court ruled that a reasonably diligent Plaintiff would have discovered the basis for the breach), the Petitioners were no longer relying on "empty promises" or mere assurances that the Unions were representing their interests. **In 1988, the Petitioners were, in addition to the oral assurances and representations, were**

relying on the fact that the Unions had currently pending, in both the District Court and before the National Labor Relations Board, cross-claims on the Petitioners' behalf.

Therefore, according to the Sixth Circuit's ruling, the Petitioners' diligence should have exceeded the determination that suit was currently pending on their behalf. This is an unreasonable and insurmountable burden. Is this Sixth Circuit requiring that the Petitioners be clairvoyants and determine before either the District Court or the NLRB had rendered a decision that the Unions' 1987 cross-claims, on Petitioners behalf, would be unsuccessful. This point is raised only because had the Morrel v. Cummings' cross claims, on the

Petitioners' behalf, been successful (in arguing for the longer contract statute of limitations), the Petitioners' claims in the instant case would have been *mooted*.

However, once the NLRB ruled that the Cumming's claims were untimely on August 27, 1991, the *first* public opinion indicating that the Unions claims on the Petitioners' behalf would likely fail, the Appellants exercised enough diligence to obtain independent counsel and have suit filed within six months of that ruling. Furthermore, it is important to note that the Petitioners did not wait on potential futile Appeals. Once they were apprised that the Morrel v. Cummings' suits were untimely they immediately sought independent representation and

brought this action.

Assuming arguendo, that the Sixth Circuit had ruled that the Petitioners' suspicions should have been excited by the fact that the Unions failed to take action on their behalf until 1987. Then the Court would have effectively held the Petitioners to higher standard than that of the Unions' sophisticated attorneys. In dismissing the Petitioners' underlying cross-claims or related litigation in Cummings v. John Morrel & Co., 1994 FED App. 0337P (6th Cir. Sept 23, 1994), where the Unions' asserted that the state statute of limitations for contract should apply, the Sixth Circuit noted that:

> Finally, the "practicalities of litigation" do not favor the use of a longer state limitations period here. In

> DelCostello the Supreme Court warned about the dangers of requiring unsophisticated workers to gather information about an event and file a lawsuit within a narrow time frame. 462 U.S. at 165-66. Here however, we are presented with a sophisticated claimant that is an experienced litigator. It works no unfairness against such a party to impose a six-month time limit on the bringing of a claim such as this one.

Id. at *17.

Assuming, the Unions' suit was filed in good faith and the Unions sincerely believed that the longer contract statute of limitations would apply, is the Sixth Circuit now holding that in 1988, the unsophisticated and uneducated Appellants' knew or should have known that the longer statue of limitations would not apply. This holding would also require that uneducated Plaintiff's

should second guess the work and expertise of their attorneys, in cases similar to the instant, and file a simultaneous contingent suit against their own attorneys while the attorneys' are currently pursuing an underlying cause of action on their behalf.

Furthermore, the Sixth Circuit cited Jones v. General Motors Corp., 939 F.2d 380, 385 (6th Cir. 1991), to buttress the proposition that relying on assurances from a union or company official is not sufficient to meet the burden of the due diligence test. However, Jones merely stands for the proposition that ignorance of the legal process due to complexities of the state and federal legal systems, alone, will not provide a basis for an equitable tolling. Id. at 385. See also

Id. (stating he thought he had to wait for right to sue letter from EEOC, before could pursue claim and thought he was to file within 90 days from that time)

Unlike Jones, the Appellants have not asserted that they failed "to file suit within the statue of limitations because of their ignorance of the 'complex state/federal legal systems.'" Id. Here, the Petitioners are alleging that the Unions' actions (Unions filing suit on their behalf) and statements (Unions' assertions that their interest were being represented so "don't go out and join the other lawsuit") induced Petitioners to forego the right to sue. Interestingly, Jones clearly states that "[t]o successfully raise a claim of equitable tolling, a party must either

show a fraudulent concealment of the critical facts that would lead one to know that he can sue, or a misrepresentation of those facts -- whether made in good faith or not -- that was calculated to induce a plaintiff to forego the right to sue." Id.

Furthermore, in Cambell, the Sixth Circuit stated in *dicta* that concealment in equitable tolling cases contemplates acts preventing a Plaintiff from discovering his cause of action. In the instant case, had the Cummings v. Morrell suit not been filed when the Aquinaga jury decisions were published in 1989, then the Petitioners' would have known that the breach had occurred. However, since Cummings v. Morrell was filed on the Petitioners' behalf when the Aguinaga

decision was rendered, it was impossible for the Petitioners' to ascertain whether or not the breach had occurred until a ruling was made on their own cross-claims in the Cummings v. Morrell suit. Therefore, the net effect of the Cummings v. Morrell cross-claims was further active concealment of affirmative facts evidencing the Unions' breach of the duty of fair representation. Until a decision in Cummings v. Morrel, further inquiries made by the Petitioners' into the legitimacy of the Unions' cross-claims would have been both futile and bothersome to the Court (as the Appellants' learned from their constant contact with Sheryl Sternberg and the NLRB).

Furthermore, the Unions' assertion

that the breach of the duty of fair representation occurred prior to the ultimate dismissal of the Cummings v. Morrel suit on August 25, 1994, infers that not only was the Cummings suit frivolous but that Petitioners knew or should have known that the Unions' efforts to represent them in Cummings were futile. However, it was not until the NLRB ruled contrary to the Unions assertions, on August 27, 1991, that Appellant were aware or had actual knowledge that the Unions might have failed to adequately represent their interests. Therefore, the Petitioners were not apprised of sufficient information to place them on notice that the Union had breached its duty of fair representation until after the NLRB

ruling.

Application of the rule requiring due diligence, as applied by the Sixth Circuit in the instant case, produces an unworkable and unjust standard. In the case now before this Court, it was impossible for the Petitioners in 1988 to have meet the due diligence requirement as applied by the Sixth Circuit. In 1988 the Unions' had pending on behalf of the Petitioners' a cause of action before the District Court and the NLRB. **At that point, Petitioners' could only wait to see whether or not these actions would adequately represent their interests and no conceivable level of due diligence could expedite that determination.**

In contrast, those Circuits tolling the limitations period until actual

discovery, in cases of active fraudulent concealment, would hold that the statute of limitations began to accrue upon the Petitioners' actual discovery (the NLRB's ruling, i.e., first public ruling) that the Unions cross-claims in Cummings v. Morrel were untimely. Therefore, tolling until actual discovery in cases of active concealments produces a more just and workable standard and does not reward Unions for their calculated and deceptive practices.

Furthermore, elimination of the due diligence requirement is consistent with doctrine equitable estoppel. In Walker M.G.. Co. v. Dickerson, Inc., 560 F.2d 1184, 1187 (4th Cir. 1977), the Fourth Circuit held that "if the doctrine of equitable estoppel is applicable, the

statute of limitations would not begin to run until the acts or representation, causing plaintiff's delay, had ceased." In the case now before this Court the Unions argued:

> [i]n support of its Rule 11 motion, . . . that Mr. Hoke, as counsel to the Cummings plaintiffs and one familar with the relevant labor laws, was uniquely position to know that the Gumbus claims were fatally flawed when he filed them and also knew that the Unions were already actively pursuing claims on behalf of Gumbus and other former Memphis employees.[5]

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[5] This is the Unions' red herring to this litigation. the Unions claimed that Asa H. Hoke knew or should have known that the Gumbus action was stale. However, this contention is misplaced. What Mr. Hoke knew or should have known is of no legal consequence. The legal standard is clearly what the Petitioners' knew or should have known and not what their attorney knew as the result of a prior non-disclosed confidential settlement providing for liquidated damages for breach of the settlements confidentiality (keeping the 1989

Therefore, the precise active concealment causing Petitioners' delay, the Unions' assertions of representation, did not cease until the Sixth Circuit's Ruling on September 29, 1994. Accordingly, the Gumbus et. al. action (quite possibly prematurely filed) should have been tolled pending resolution of Cummings v. Morrell for had the Unions been successful in the Cummings case, the Gumbus et al. claim would have been moot.

The Sixth Circuit's application of

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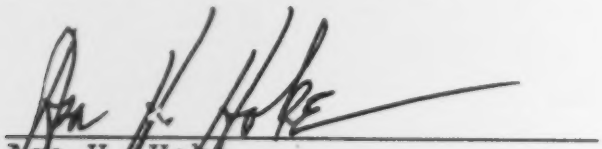
settlement confidential was a further active concealment by the Union). the law, therefore, mandates that a factual determination be made as to what the Gumbus et. al. employees knew or should have known in determining the timeliness of their claim against the Unions for the Unions' breach of the duty of fair representation. Tom impute an attorney's knowledge on the Petitioners would undermine the current legal standard.

the due diligence standard in the case now before this Court is dangerous precedent. It rewards Unions' for calculated and deceptive practices adversely impacting Union members who are particularly vulnerable to the Union. Union members vote for the Unions because they believe in the Unions and feel as if the Unions will always represent their interests. Judicial notice must be taken of the message this decision is sending: The countenancing of calculated deceptive practices and all but sanctioning those who complain of the harm occasioned by those deceptive practices while rewarding the Unions with freedom from liability to those damaged by its actions.

CONCLUSION

For these reasons, the Court should grant this Petition for Certiorari and, upon review, the judgment of the Sixth Circuit Court of Appeals should be reversed in relevant part.

Respectfully submitted,



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